

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



**77-1209**  
**1029**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 77-1209

SANTOS PETRUCELLI, :

Appellant. :

-----X

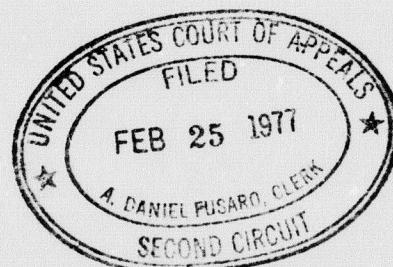
B  
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ON APPEAL FROM A CONVICTION  
OF THE  
UNITED STATES DISTRICT COURT  
FOR THE  
SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO BRIEF FOR  
APPELLANT SANTOS PETRUCELLI

HOWARD L. JACOBS, P.C.  
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New York, New York 10013  
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HOWARD L. JACOBS  
DONALD E. NAWI  
Of Counsel



**PAGINATION AS IN ORIGINAL COPY**

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\* No opinion of the district court is relevant to the appeal issue.

Docket Entries A 1

CRIMINAL DOCKET - U.S. District Court	
PETTY OFFENSE PO	JUDGE JOHN J. CONNOLY ASSISTANT U.S.
OTHER MINOR OFFENSE MO	0863
OTHER MISDEMEANOR MIS	Disp/Sentence
FELONY Fel X 0208 1	LAST, FIRST, MIDDLE

PETRUCELLI, SANTOS

FEB 9 1976

04 14 76 0371 01

18:111  
26:7212(a)

OFFENSES CHARGED  
Assault of U.S. Officer.  
Attempt to interfere with admin. of internal  
revenue laws.

ORIGINAL COUNTS

1

1-3

II. KEY DATES & INTERVALS

ARREST	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custod, Bayan 4-5-76	High Risk Date Information 4-14-76	1st Plea JNG G NOL	Trial Set For Voir Dire
Summons Served	Indict. Waived	Final Plea G Plea W/Drawn	Trial Began
First Appearance	In Charging Officer 8-13-76	JNG G NOL	Trial Ended

SUPERSEDED COUNTS

SENTENCE

OF CHARGES

OF DEFENDANT

ADMITTED

DISMISSED

W.D.C. W.P.

ON GUARDED

SEARCH WARRANT		DATE	INITIAL/NO.	INITIAL APPEARANCE DATE	INITIAL/NO.	OUTCOME
Issued						Held for arraignment
Return						Proceeding in magistrate's court
Summons	Issued					
Served						
Arrest Warrant Issued						
COMPLAINT						
OFFENSE (In Complaint)						

U.S. Attorney or Asst.

Alan Levine  
791-1934

236

ATTORNEYS Defense CJA Pet L. Waived Self None Other LPS CO  
Joseph Hallinan Howard Jacobs  
Howard Jacobs 401 BOWAY - Suite 1902  
N.Y. N.Y. 10013  
1394 431-3710

\* Show last names and suffix numbers of other defendants on same indictment/information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY
4-14-76		Filed indictment.	IN 100
4-15-76		76 Cr Santos Petrucelli (Jail) Deft. (Atty. present pleads not guilty. Motion for reduction of bail set by Magistrate at \$10,000 bail. Motion granted. Court fixes bail at \$10,000 P.R.B. secured by \$200.00 cash. Deft. continued remanded in lieu of bail. Case assigned to Judge Werker.	IN 100
5-3-76	/	Filed order--ORDERED that Dr. Gurston Goldin, MD be employed to observe deft.; ORDERED that reasonable costs not to exceed \$150.00 be paid to said doctor and that the doctor submit to the court a report as to his findings. Werker, J. (consented to) m/n	IN 100

( see over )

Docket Entries A 2

CHARGE THE APPROPRIATE DOCKET ENTRIES SHOW IN SECTION V. ANY OCCURRENCE OF EXCLUDABLE DELAY REFERRED TO IN 3161(d)(1)

LETTER CODE

DATE	IV. PROSECUTION ACTIVITIES	DATE	V. EXCLUDABLE DELAY
4-30-76	PTC held. order is signed for psychiatric examination. Awaiting report. Werker,J.		
5-7-76	Filed temporary commitment dated April 5, 1976.		
5-7-76	Filed the following papers recd. from the office of Mag. Hartenstein: docket sheet; complaint filed on 4/2/76; disposition sheet; warrant of arrest dated 4/2/76 unexecuted and warrant of arrest dated 4/2/76 with marshal's return dated 4/5/76 and CJA copy # 5 appointing C. Joseph Hallinan of 20 E. 46 St, NYC 10017 as defts. atty.		
6-9-76	Filed CJA copy # 2 authorizing xp payment to Gurston Goldin, M.D. of 166 E. 63 St, NYC 10021 for expert services in theamt. or \$150.00 on 5/18/76. Orig. mailed to AO, Wash., DC for payment.		E. Hearings on transfer motions F. Transfers from other districts G. F.R.C.P. H. 20.21 I. 461
6-9-76	Filed CJA copy # 5 authorizing payment to Gurston Goldin for expert services. Werker,J.		
4-15-76	Filed appearance bond inthe amt. of \$10,000 secured by \$200.00 cash. (receipt # 68933)		
6-30-76	PTC held. Trial date set for Aug. 24, 1976 at 2pm in Rm. 2704 and indictment is amended to read, "unlawfully, wilfully and knowingly" after "the deft.". Werker,J.		A. Present Magistrate or Commissioner B. Date of arraignment C. Period of up to 30 days is excludable D. 3161(h), 1-101
8-13-76	Filed indictment, referred to Judge Werker related and superseding 76 Cr 371 pursuant to Speedy Trial Act. Superseding indictment is to retain the same number. Goettel, J.		E. Annulment F. Dismissal G. Appeal H. Motion for supervision I. Deportation J. Extradition K. Prosecution def- erred by plea agree- ment L. Defendant is essential witness M. Period of men- tal or phys cal incompetence of defendant and trial N. Period of victim's treat- ment or rehabilitation O. Subpoena and/or new charges P. Defendant warning that if defendant when no severance has been granted
8-25-76	Deft. and Atty. Havara Jacobs present. Deft. interrs a "not Guilty" Plea. Bail Cont'd as fixed in the amount of \$10,000 P.R.B sec. by \$200 Cash and continue under supervision of pre-trial service. Trial Jury to commence at 11:00 a.m.		
8-25-76	Trial continued and concluded. Deft. found "Guilty" on Count 1 N/G on Ch. 3. Pre-Sent. Inv. Ordered Deft. to surrender Passport to U S. Atty's Office Date of Sentence Sept. 23. 1976 at 4:30 P.M. Werker,J.		
9-21-76	Filed JUDGMENT (atty. Howard Jacobs, present)--the deft. is hereby committed to the custody of the Atty. General or his authorized representative pursuant to Title 18, USC Section 4205(d) for study and report and recommendations. This commitment deemed to be for maximum sentence prescribed by law, pursuant to Title 18, Section 4205(c). The results of such study together with any recommendations which the Director of Prisons believe would be helpful in determining the disposition of the case, shall be furnished to the court within THREE(3) MONTHS. Werker,J. (copies issued)		
9-17-76	Bench warrant ordered. Defts. bail to be forfeited if deft. does not surrender by 9/20/76. (minute s sealed) Duffy,J.		
09-17-76	B/W issued.		
9-29-76	Filed one sealed envelope ordered sealed and impounded and placed in vault in cashier's office. (envelope contains exhibits filed in court on 9/17/76,etc.) . Duffy,J.		

(P.D. Pg. 3)

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

**Docket Entries A 3**

76 CA 371 USA VS PETROCELLI

WERKER, J.

RKH:ee  
n-2453

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA, :  
- v - : INDICTMENT  
SANTOS PETRUCELLI, : 76 Cr.  
Defendant. :  
-----x

COUNT ONE

The Grand Jury charges:

On or about the 18th day of March, 1976, in the Southern District of New York, SANTOS PETRUCELLI, the defendant, unlawfully, wilfully and knowingly and by threats of force endeavored to intimidate and impede an officer and employee of the United States, to wit, a Revenue Officer of the United States Internal Revenue Service, who was acting in an official capacity under Title 26 of the United States Code, and by threats of force endeavored to obstruct and impede the due administration of the income tax laws under Title 26 of the United State Code, in that SANTOS PETRUCELLI, the defendant, in substance said in a telephone conversation that "the blacks" were going to get Revenue Officer Joseph Tacopina and asked Revenue Officer Tacopina in substance whether he (Mr. Tacopina) would like a punch.

(Title 26, United States Code, Section 7212(a).)

COUNT TWO

The Grand Jury further charges:

On or about the 18th day of March, 1976 in the Southern District of New York, SANTOS PETRUCELLI, the defendant, unlawfully, wilfully and knowingly and by threats of force endeavored to intimidate and impede an officer and employee of the United States, to wit, a Revenue Officer of the United States Internal Revenue Service acting in an official capacity under

RKN:ee  
n-2453

Title 26 of the United States Code, and by threats of force endeavored to obstruct or impede the due administration of the income tax laws under Title 26 of the United States Code, in that SANTOS PETRUCELLI, the defendant, in substance said in a telephone conversation that if the United States government did not stop harrassing people in South America and Mexico, a bomb would be placed in the Internal Revenue Service building at 120 Church Street, New York, New York.

(Title 26, United States Code, Section 7212(a).)

COUNT THREE

The Grand Jury further charges:

On or about the 31st day of March, 1976 in the Southern District of New York, SANTOS PETRUCELLI, the defendant, unlawfully, wilfully and knowingly and by threats of force endeavored to intimidate, and impede an officer and employee of the United States, to wit, a Revenue Officer of the United States Internal Revenue Service who was acting in an official capacity under Title 26 of the United States Code, and by threats of force endeavored to obstruct and impede the due administration of the income tax laws under Title 26 of the United States Code, in that SANTOS PETRUCELLI, the defendant, in substance said in a telephone conversation that he carries a gun and that Revenue Officer Tacopina was going to pay with blood for collecting taxes from the defendant.

(Title 26, United States Code, Section 7212(a).)

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Foreman

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ROBERT E. FISKE, JR.  
United States Attorney

1

## CHARGE OF THE COURT

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Worker, J.: Madam Forelady and ladies and gentlemen of the jury: Now that the evidence is all in and counsel have summed up their respective contentions, the time has come for you and I to perform our respective functions in the administration of justice in this case.

7

As I stated to you at the outset, it is my duty to instruct you as to the principles of law to be followed and it is your duty to accept those instructions as they are given by me and apply them to the evidence in this case.

11

The indictment against this defendant is not evidence and it does not carry with it any presumption of guilt. It is merely a means by which the defendant and the jury are informed of the nature of the charges or accusations and the means of bringing the defendant to trial.

16

The defendant in this case has pleaded not guilty and by that plea has put in issue each of the elements of the charge made against him.

19

You may not give any weight whatever to the fact that an indictment has been returned against the defendant. It is your duty to determine the facts as derived from your consideration of the evidence in this case and then applying the principles of law to decide whether the defendant on trial before you is guilty or not guilty of any of the charges made against him.

1

## CHARGE OF THE COURT

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2 You are the sole and exclusive judges of the  
3 facts. If your recollection of the evidence differs in any  
4 way from the recollection of counsel or the Court, your  
5 recollection controls and should be relied upon by you.  
6 Your judgment as to what the facts are controls. You must  
7 approach your duty with complete fairness and impartiality.  
8 The Government and this defendant are equally entitled to  
9 justice in this court.

10 The fact that this prosecution is brought up  
11 in the name of the United States of America doesn't entitle  
12 the Government to any greater consideration than any other  
13 litigant would get, but by the same token it is entitled to  
14 no less consideration.

15 The issues in this case must be decided on the  
16 evidence and on the law.

17 Before I turn to the indictment in this case  
18 and the charges that are made against the defendant here,  
19 let me first give you a few basic principles that should  
20 govern you in your deliberations.

21 Under your oath as jurors you should not and  
22 cannot allow sympathy for the defendant or consideration of  
23 punishment which he might receive if found guilty to enter  
24 into your deliberations or to affect, or influence, your  
25 judgment in any way.

## CHARGE OF THE COURT

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1  
2           The duty of imposing sentence in the event of  
3        a conviction would rest exclusively upon the Court and upon  
4        the Court's own conscience.

5           During the trial I have been called upon to make  
6        rulings from time to time. I have sustained some objections,  
7        I have overruled others, and on one or two occasions, I may  
8        have ordered testimony stricken and have advised you to  
9        disregard it.

10          It is important in the performance of your duties  
11        that you limit your consideration of the evidence to that  
12        which was actually received in the case and not to give any  
13        consideration to any evidence that is stricken.

14          It is equally important that you do not draw  
15        inferences against either side because of any objections that  
16        counsel may have made or the fact that it may have been neces-  
17        sary from time to time to engage in conferences at the side  
18        bar or to exclude you from the courtroom altogether.

19          Under our system of justice in this country,  
20        it is the function and duty of counsel to object to anything  
21        that they think is legally improper, and they would be remiss  
22        in their duty if they failed to do so. But it is my function  
23        and duty to rule on these questions of law, and I would be  
24        remiss in my duty too if I failed to make such rulings even  
25        though sometimes they may not have been to the liking of

## 1 CHARGE OF THE COURT

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2 counsel for either side.

3 If during the course of the trial from my rulings  
4 or questions or facial expressions on some of the questions  
5 that I may have put to a witness you get the impression that  
6 I personally have any views on the credibility of any of the  
7 witnesses or on the weight to be given to their testimony  
8 or to the proof or to the merits of the case, please disregard  
9 it.

10 It is not my intention to imply or express any  
11 opinion or any views to you with respect to the facts in the  
12 case or the merits, or the credibility of any witness. That  
13 is your sole and exclusive function.

14 Any questions which I may have put to witnesses  
15 during the course of the trial have been put to those wit-  
16 nesses for purposes of what I hoped was to be clarification  
17 of issues which you might ultimately decide. It was not  
18 to give you the impression that I was siding one way or  
19 another. Whatever my feelings may be in this matter are  
20 completely immaterial and irrelevant.

21 No inference is to be drawn from that indictment  
22 or from the fact that an indictment has been filed. The  
23 grand jury was not asked to determine whether this defendant  
24 was guilty or not guilty of the charges contained in the  
25 indictment. That is your function as jurors and your function

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2 alone. Under our law every defendant -- and that is true  
3 of the defendant in this case -- is presumed to be innocent.  
4 That presumption of innocence is in each defendant's favor  
5 throughout the entire trial and even into your deliberations  
6 in the jury room.

7 It is overcome only if, as, and when you deter-  
8 mine that his guilt has been established beyond a reasonable  
9 doubt by the credible evidence in this case.

10 The burden is upon the Government to establish  
11 his guilt beyond a reasonable doubt, and that burden applies  
12 to each element of the crimes charged against the defendant.  
13 That burden never shifts to the defendant. It always remains  
14 the Government's right down to the end of the trial.

15 I have mentioned the term "beyond a reasonable  
16 doubt." What does that mean?

17 A reasonable doubt means a doubt founded upon  
18 reason. As the words imply, it is such a doubt as will be  
19 entertained by a reasonable man after all the evidence in the  
20 case is carefully analyzed, compared, and weighed. A reason-  
21 able doubt may arise not only from the evidence produced,  
22 but also from a lack of evidence. Since the burden is upon  
23 the Government to prove the defendant guilty beyond a reason-  
24 able doubt of every essential element of each crime charged,  
25 a defendant has the right to rely upon a failure of the

## 1 CHARGE OF THE COURT

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2 prosecution to establish such proof. However, absolute or  
3 mathematical certainty is not required, but there must be  
4 such certainty as satisfies your reason and judgment, and  
5 such that you feel conscientiously bound to act upon it.  
6 It is not a fanciful doubt or a whimsical or capricious doubt,  
7 but anything relating to human affairs and depending upon  
8 human testimony is open to some possible or imaginary doubt.

9 A reasonable doubt is such doubt as would cause  
10 a prudent person to hesitate before acting in matters of  
11 importance to himself or herself. In other words, if the  
12 evidence warrants, in your judgment, the conclusion that a  
13 defendant is guilty so as to exclude every other reasonable  
14 conclusion, you should declare him guilty. On the other  
15 hand, if on all the evidence you have a reasonable doubt as  
16 to the guilt of a defendant, you must find him guilty.

17 Whenever in these instructions I tell you that  
18 a certain element must be established before there can be a  
19 conviction on a certain count, I mean that this element must  
20 be established according to the standard of proof I have just  
21 explained -- that is, proof beyond a reasonable doubt. That  
22 standard applies to every finding that is essential to a con-  
23 viction of the defendant on any count. So if I don't repeat  
24 that standard of proof each time, bear in mind that it applies  
25 every time I speak to you about an element of the offense or a

## 1 CHARGE OF THE COURT

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2 finding that you are entitled to make. So with respect to  
3 all such elements or findings necessary to conviction on any  
4 count, I instruct you that you may not conclude that such an  
5 element or such a finding is established simply because you  
6 may think the weight of the evidence tips somewhat in favor  
7 of the Government. The standard of proof is proof beyond  
8 a reasonable doubt.

9 The indictment here charges that in two separate  
10 incidents the defendant, Santos Petrucelli, endeavored to  
11 intimidate an officer and employee of the Internal Revenue  
12 Service and to obstruct the administration of the income  
13 tax laws, and charges that he did so in violation of a  
14 criminal law of the United States, specifically Section 7212  
15 (a) of Title 26 of the United States Code.

16 In broad and general terms, the statute I have  
17 just mentioned is designed to protect the integrity of the  
18 administration of the income tax laws, including, of course,  
19 the collection of taxes. As part of this protection of the  
20 process of administration of the income tax laws, the  
21 statute is designed to prevent improper inference with or  
22 influence upon those engaged in the administration of the  
23 tax laws, including revenue officers.

24 In addition to protecting the process of collec-  
25 tion of taxes, the law is also designed to protect people,

## 1                   CHARGE OF THE COURT

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2                   that is, to protect officers and employees of the Internal  
3                   Revenue Service from threats of harm made while these persons  
4                   are engaged in their official duties.

20                 5                   The sweep of the law extends to any endeavor  
6                   by threats of force to obtain the improper result. Thus,  
7                   the key word is "endeavor," which means any attempt, however  
8                   contrived or useless and whether or not successful, to  
9                   achieve certain ends by threats of force.

10                 Success or failure of an alleged attempt to  
11                  intimidate an officer or impede the process is not legally  
12                  material, as I will charge in more detail later, and is not  
13                  an element of the offense.

14                 As I have told you, the defendant is charged with  
15                  violating Title 26 Section 7212 of the United States Code.  
16                 The pertinent provisions of this statute read as follows:

17                 Whoever by threats of force, including any  
18                  threatening communication, endeavors to intimidate or impede  
19                  any officer or employee of the United States acting in an  
20                  official capacity under Title 26 of the United States Code  
21                  or in any other way, by threats of force, including any  
22                  threatening communication, endeavors to obstruct or impede,  
23                  the due administration of Title 26 of the United States Code  
24                  commits a crime.

25                 Now, the indictment in this case reads as follows:

1

## CHARGE OF THE COURT

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2                   At or about the 18th day of March 1976 in the  
3 Southern District of New York, Santos Petruccelli, the defen-  
4 dant, unlawfully, willfully, and knowingly, and by threats  
5 of force, endeavored to intimidate and impede an officer or  
6 employee of the United States, to wit, a Revenue Officer  
7 of the United States Internal Revenue Service who was acting  
8 in an official capacity under Title 26 of the United States  
9 Code, and by threats or force endeavored to obstruct and  
10 impede the due administration of income tax laws under  
11 Title 26 of the United States Code in that Santos Petruccelli,  
12 the defendant, in substance, said in a telephone conversation  
13 that, "the blacks" were going to get Revenue Officer Joseph  
14 Tacopina and asked Revenue Officer Tacopina, in substance,  
15 whether he, Mr. Tacopina, would like a punch.

16

That was Count One of the indictment.

17

Count Three of the indictment is as follows:

18

The grand jury further charges on or about the  
19 31st day of March 1976, in the Southern District of New York,  
20 Santos Petruccelli, the defendant, unlawfully, willfully,  
21 and knowingly, and by threats of force, endeavored to intimi-  
22 date and impede an officer, an employee, of the United States,  
23 to wit, a Revenue Officer of the United States Internal  
24 Revenue Service, who was acting in an official capacity under  
25 Title 26 of the United States and by threats or force

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2       endeavored to obstruct and impede the due administration of  
3       the income tax laws under Title 26 of the United States Code  
4       in that Santos Petrucci, the defendant, in substance, said  
5       in a telephone conversation that he carries a gun and that  
6       Revenue Officer Tacopina was going to pay with blood for  
7       collecting taxes from the defendant.

8                   The statute uses the term "threats of force"  
9       which it specifically defines, in parts relevant to this  
10      charge to mean threats of bodily harm to the officer or  
11      employee of the United States. The statute specifically  
12      includes any threatening communication within the definition.

13                  In daily life, not all references to force  
14      constitute threats. Some may simply be rhetorical or over-  
15      statement, which under the circumstances could not possibly  
16      put someone in actual fear. On the other hand, acts or  
17      statements constitute an actual threat if they instill fear  
18      in the person to whom they are directed or if they are  
19      reasonably calculated, in light of the surrounding circum-  
20      stances, to instill fear in the person to whom they are  
21      directed or in an ordinary person. In this regard, you may  
22      consider that words harmless in themselves may take on a  
23      sinister and threatening meaning in the context in which  
24      they are used; on the other hand, you may decide that the  
25      words that the Government contends were used by the defendant,

1

## CHARGE OF THE COURT

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2       in their circumstances and full context, carried no threatening  
3       significance.

4                  In evaluating whether there threats of force  
5       in any of the counts charged, you should take into considera-  
6       tion all of the evidence in this case bearing on what the  
7       person making the allegedly threatening remark intended  
8       by the remark, as well as the manner in which the statements  
9       were made. If you find that the defendant made a particular  
10      remark, in order to determine whether that remark was  
11      threatening you may consider, among other surrounding circum-  
12      stances what, if anything, the defendant knew about the person  
13      at whom the remark was directed.

14                  In the context of this case, if you find that  
15      the defendant made the tape-recorded remarks, in order then  
16      to determine whether those remarks constituted threats of  
17      force, you may consider what, if anything, the defendant  
18      believed that Tacopina, or any other person at whom the  
19      remarks were directed, knew about him. If you find the  
20      defendant made an anonymous call, you may consider whether  
21      the defendant's failure to identify himself has any signifi-  
22      cance in determining if that anonymous remark was threatening.

23                  The evidence in this case raises the question  
24      of whether the defendant was in fact the individual who made  
25      the telephone call to Mr. Tacopina and this necessitates your

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2 resolving any conflict or uncertainty in testimony on that  
3 issue.

4 The burden of proof is on the Government to prove  
5 beyond a reasonable doubt the identity of the defendant as  
6 the person who made the telephone call. You are not bound  
7 by a witness's identification of the disputed voice. You  
8 may reject the witness's opinion if after careful considera-  
9 tion of all the evidence in the case you disagree with the  
10 opinion. You must find that the Government has proved  
11 beyond a reasonable doubt that the defendant, Mr. Petrucelli,  
12 was the individual who made the telephone call to Mr. Taco-  
13 pina.

14 I further charge you that if you determine beyond  
15 a reasonable doubt that the defendant made a threatening  
16 remark, in order to convict the defendant you need not find  
17 that the defendant actually intended to carry out that threat.  
18 Nor must you find that the threat was made directly to the  
19 person who was the target of the threat. You also need not  
20 find that the threat was that the defendant himself would  
21 use force. It is sufficient if the threat is that someone  
22 else will use force against the person who is threatened.

23 The next word to define is "endeavors," which,  
24 as used in this law, means to try, or means any effort, at-  
25 tempt, or act, however contrived or futile, to accomplish a

1

## CHARGE OF THE COURT

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2 result.

3 Title 26 of the United States Code is the compilation  
4 or gathering together of many provisions dealing with  
5 the income tax laws, including, among other things, sections  
6 that establish rules governing deductions a taxpayer can  
7 take, what is considered taxable income, what penalties a  
8 person must pay if he hasn't paid as much tax as the Government  
9 says a person owes, procedures to dispute or appeal  
10 what a Government employee says is the amount of tax owed,  
11 and means for the collection of taxes owed but not paid.

12 The due administration of Title 26 then refers  
13 to the fair, impartial, uncorrupted and unimpeded operation  
14 of these sections, and the operation and functioning of the  
15 Government employees, officers, and staffs who carry out and  
16 oversee the operation of the tax laws. This due administra-  
17 tion covers every step or action within the I.R.S. in a  
18 particular tax matter and in all tax matters.

19 To impede or obstruct the due administration  
20 just described, means to interfere with or block any step,  
21 requirement, or process in effectuating the due administra-  
22 tion.

23 The word "intimidate" as used in the statute  
24 simply means to make timid or fearful or to arouse or inspire  
25 or instill fear in another.

## 1                   CHARGE OF THE COURT

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2                   When reference is made to acting in an official  
3                   capacity, all that is meant is that a Government officer  
4                   or employee is engaged in his ordinary or usual duties  
5                   rather than being off on private business. In the context  
6                   of this case, to find that something was done to someone  
7                   acting in an official capacity under Title 26, you must  
8                   find that it was done to that person in connection with his  
9                   duties and employment as an employee or officer of the Inter-  
10                  nal Revenue Service.

11                  Now we get down to the elements of the offense.

12                  With respect to each of the two counts in the  
13                  indictment, before you may convict the defendant you must be  
14                  satisfied beyond a reasonable doubt as to the particular  
15                  count you are considering.

16                  First: that the defendant used threats of force.

17                  Second: by using threats of force, the defendant  
18                  endeavored to intimidate or impede an officer or employee  
19                  of the United States acting in his official capacity with  
20                  respect to the income tax laws or in any way by threats of  
21                  force endeavored to obstruct or impede the due administration  
22                  of the provisions governing the income tax laws. As to  
23                  this particular element it is sufficient if you find beyond  
24                  a reasonable doubt that the defendant endeavored to do either  
25                  of the two things I just described. You need not find that

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2 he endeavored to do both.

3 Third: that the defendant's acts were done know-  
4 ingly, willfully, and intentionally.5 Fourth: that the crime charged was committed  
6 in the Southern District of New York. If, as here, the crime  
7 is charged to have been committed by a telephone call, I  
8 charge you that it is committed both in the place where the  
9 call is made and where the call is received.10 I further charge you that as a matter of law  
11 the Internal Revenue Service buildings at 120 Church Street  
12 and 26 Federal Plaza in Manhattan are in the Southern District  
13 of New York. Therefore, if you find that a call has been  
14 made either to or from the Internal Revenue buildings then  
15 it has taken place in the Southern District of New York.16 As to each of the two counts, in order to convict  
17 on the count being considered you must find, as part of what  
18 I just have told you are the required findings, that the  
19 defendant was a party to the telephone call charged in that  
20 count, and that by his words and deeds the defendant specifi-  
21 cally intended and endeavored either to intimidate or impede  
22 an I.R.S. officer or employee, or to obstruct or impede the  
23 due administration of the tax laws.24 Intention can be proved by direct evidence or  
25 circumstantially or by inference, so long as it is proved

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2 beyond a reasonable doubt. If you find that the defendant  
3 had a particular telephone conversation as charged, but that  
4 he did not intend by that conversation to intimidate, instruct  
5 or impede as I have described, then the defendant cannot be  
6 convicted.

7 On the other hand, if you find beyond a reason-  
8 able doubt that a threatening call was made with the specific  
9 intent to intimidate, instruct, or impede, as I have described,  
10 and if you also find beyond a reasonable doubt that the  
11 other essential elements to which I have referred, then you  
12 have enough upon which to reach a verdict of guilty.

13 Moreover, in order to convict the defendant,  
14 you need not find that the person alleged to be the object  
15 of a threatening communication actually feels threatened or  
16 in physical danger.

17 As I indicated to you earlier, as to all of the  
18 counts charged in the indictment, the Government must prove  
19 beyond a reasonable doubt that the defendant acted willfully  
20 and knowingly; that is, that the defendant knew what he was  
21 doing and that he did it deliberately and voluntarily, as  
22 opposed to mistakenly or accidentally or as a result of some  
23 coercion. An act is willful if it is done knowingly, de-  
24 liberately, and with a bad motive or purpose. Of course,  
25 it is not necessary that the defendant knew he was violating

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2 any particular law.

3 Knowledge and intent exist in the mind. Since it  
4 is not possible to look into a person's mind to see what went  
5 on, the only way you have for arriving at a decision on these  
6 questions is for you to take into consideration all the facts  
7 and surrounding circumstances shown by the evidence, including,  
8 of course, the exhibits and to determine from all such facts  
9 and circumstances whether the requisite knowledge and intent  
10 were present at the time in question. Direct proof is un-  
11 necessary. Knowledge and intent may be inferred from all  
12 the surrounding circumstances, including, for example, at-  
13 tempts to hide the identity of a person making a phone call.  
14 Another example is that from the fact that a person's signa-  
15 ture appears on a document you may infer that he has knowledge  
16 of its contents.

17 You have heard testimony by Internal Revenue  
18 Service Inspector Danny Webb that the defendant made a state-  
19 ment shortly after he was arrested. If you find that the  
20 defendant did make the statement then you may give the state-  
21 ment such weight as you believe it deserves after considering  
22 all the circumstances which were brought out in the evidence.

23 The Government has presented evidence during this  
24 trial which was derived from a telephone conversation to  
25 which one party had consented that it be recorded, namely,

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2 Inspector Santiago.

22     3                 As you know, this is different from a wiretap  
4                 in which a third party listens in and records a telephone  
5                 conversation to which he is not a party. The laws which  
6                 govern the legality of recordings and wiretapes are designed  
7                 to protect the right of privacy, which Mr. Santiago could  
8                 voluntarily give up as to this conversation. With respect  
9                 to the evidence in this trial which has been the product  
10                 of the recorded conversation, I have found that the recording  
11                 was conducted according to the law. Thus, you may not ques-  
12                 tion during your deliberations whether or not that particular  
13                 evidence before you was legally obtained. This is a question  
14                 for the consideration of the Court alone. On the other  
15                 hand, you obviously may, and must, consider whether the  
16                 defendant was the other party to the conversation, and, if  
17                 he was, what he meant by his remarks.

18                 Now, in performing your function, one of the  
19                 most important things you have to do is to pass upon this  
20                 matter of credibility, that is, the believability of the  
21                 various witnesses who have appeared before you. In passing  
22                 on the credibility of each of the witnesses there are certain  
23                 considerations you may well have in mind. One of these is  
24                 the appearance which the witness made when he was on the  
25                 stand. You should try to "size him up." Did he appear to be

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2 telling the truth? Did he appear to be honest? Did he  
3 appear to be intelligent? Did he appear to be a person who  
4 could have observed accurately what he is telling you about,  
5 who would be likely to have remembered it accurately and who  
6 is capable of reporting it to you accurately?

7 Another question for you to have in mind regard-  
8 ing each witness is the question as to whether the story he  
9 has told you is plausible. Does it ring true or are there  
10 inconsistencies in it? How does it fit in with the other  
11 evidence in the case which you do believe and other facts  
12 you find to have existed? Does it jibe with that evidence  
13 and those facts? In short, does the testimony which was  
14 given by the particular witness whose credibility you are  
15 considering seem to you to be plausible?

16 Another question you may well ask yourself in  
17 passing on the credibility of any witness is whether that  
18 witness has any bias or interest in the outcome of the case,  
19 and, if so, whether he has permitted that bias or interest  
20 to color his testimony. It, of course, does not follow  
21 simply from the fact that a witness does have a bias or  
22 does have an interest in the outcome of the case that his  
23 testimony is to be disbelieved.

24 In considering the testimony of Government wit-  
25 nesses you should bear in mind that their testimony is entitled

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2                   to no greater significance simply because they are employees  
3                   of the Government. Their testimony should be subject to the  
4                   same considerations you apply to any witness, regardless of  
5                   their employment by the Government.

6                   The law does not compel a defendant to take the  
7                   witness stand to testify and no unfavorable inference of any  
8                   sort may be drawn from the fact that a defendant chooses not  
9                   to testify.

10                  You must not permit such a fact to weigh in the  
11                  slightest degree against the defendant, nor should it enter  
12                  into your discussions or deliberations. A defendant is not  
13                  required to establish his innocence; he need not produce  
14                  any evidence whatsoever if he does not choose to do so, and  
15                  there cannot be any adverse inference drawn from a defendant's  
16                  failure to produce evidence.

17                  As I have indicated, the burden is on the  
18                  Government to prove a defendant guilty beyond a reasonable  
19                  doubt; if it fails, a defendant has the right to rely on  
20                  that failure and, of right, must be acquitted.

21                  Evidence is of two types, direct evidence and  
22                  circumstantial evidence.

23                  Direct evidence is where a witness testified  
24                  to what he saw, heard, observed, what he knows of his own  
25                  knowledge, or something that comes to him by virtue of his

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2 senses.

3 Circumstantial evidence is evidence of facts and  
4 circumstances from which one may infer connective facts which  
5 reasonably follow in the experience of mankind. Circumstan-  
6 tial evidence is that evidence which tends to prove a disputed  
7 fact by proof of other facts which have a logical tendency  
8 to lead the mind to a conclusion that those facts exist  
9 which are sought to be established.

10 Circumstantial evidence, if believed, is no less  
11 valued than direct evidence because in either case you must  
12 be convinced beyond a reasonable doubt of the guilt of the  
13 defendant.

14 Let us take one simple example, one often used  
15 to illustrate what is meant by circumstantial evidence.

16 We will assume that when you entered the court  
17 house this morning the sun was shining brightly outside and  
18 it was a clear day; there was no rain and the sky was clear.  
19 Assume that in this courtroom the blinds were drawn and the  
20 drapes were drawn so that you could not look outside. Assume  
21 as you are sitting in the jury box and despite that it was  
22 dry when you entered the building, somebody walks in with an  
23 umbrella dripping water and is followed in a short while  
24 by a man with a raincoat which is wet. Now, on our assump-  
25 tions that you cannot look out of the courtroom and see

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2 whether it is raining or not, and if you were asked, "Is it  
3 raining?" you cannot say you know it directly or from your  
4 own observation, but certainly upon the combination of facts  
5 and given that when you entered the building it was not  
6 raining outside, it would be reasonable and logical for you  
7 to conclude that it is now raining outside.

8 That is about all there is to circumstantial  
9 evidence. You infer on the basis of reason and experience  
10 from an established fact the existence of some further fact.

11 There are times when different inferences may  
12 be drawn from facts, whether they are proved by direct or  
13 circumstantial evidence.

14 The Government asks you to draw one set of in-  
15 ferences while the defendant asks you to draw another. It  
16 is for you to decide, and for you alone, what inferences  
17 you will draw.

18 In conclusion, the purpose of your deliberations  
19 is to exchange views with your fellow jurors, to discuss and  
20 consider the evidence, to listen to each other's arguments,  
21 to present your own views, and to reach a unanimous verdict  
22 based solely and wholly on the evidence if you can do so  
23 without violence to your own individual conscience and judg-  
24 ment.

25 Each of you must decide the case for yourselves

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2 but do so only after impartial consideration of the evidence  
3 in the case with your fellow jurors.

4 Do not hesitate to re-examine your views and  
5 to change your opinions when after a discussion it appears  
6 to be in error.

7 But if after carefully weighing all the evidence  
8 in the case and the arguments of your fellow jurors you hold  
9 a conscientious view which differs from the others, you are  
10 not to yield your view simply because you are outnumbered.  
11 Your final vote must reflect your objective and deeply thought  
12 out determination of the issues.

13 If, in the course of your deliberations, you desire  
14 any portion of the testimony to be read back, or to hear any  
15 portion of the tape again, you may send in a note to the  
16 Court asking for whatever will clear up any of the questions  
17 you may have.

18 This is a caveat, an admonition that I must ask  
19 of you: when you do have a question, you should be very  
20 specific about that question. If you are specific, we can  
21 find it more easily in the testimony which has been given  
22 or in the tape which you have heard.

23 23 In communicating with the Court I should admonish  
24 you that you should never indicate how your vote may then  
25 be divided. The reason for that is simple: your delibera-

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2                   tions are secret and it would be a breach of that secrecy  
3                   to communicate how the jury has voted at any time except  
4                   to announce that you have reached a unanimous verdict.

5                   In the event you members cannot agree unanimously  
6                   upon a verdict after due deliberation, do not indicate to  
7                   anyone, including the Court, how the jury has voted or why  
8                   you cannot agree unanimously upon a verdict; merely indicate  
9                   that you consider yourselves to be deadlocked.

10                  If I should ask you any questions in court during  
11                  the course of your deliberations, pause before you answer  
12                  and carefully consider my question. If the answer calls for  
13                  a yes, no, or maybe reply, give only the reply to my question  
14                  and do not volunteer any additional statements. In any event,  
15                  do not say any more than is necessary to inform me of your  
16                  answer.

17                  When you indicate that you have reached a verdict,  
18                  do not indicate what your verdict is. You will be asked  
19                  to state that orally through your forelady in open court.

20                  I will conclude by simply saying your oath sums  
21                  up your duty, and that is, without fear or favor to anyone  
22                  you will well and truly try the issues between the defendant  
23                  and the Government of the United States based solely upon the  
24                  evidence which has been introduced and the Court's instructions  
25                  as to the law.

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2 Remember, you must consider each count and make  
3 a decision with respect to each verdict.

4 Your verdict, whether it be guilty or not guilty,  
5 must be unanimous.

6 This case is important to the government and it  
7 is important to the defendant. Give it your faithful con-  
8 sideration.

9 I now ask that the marshalls be sworn.

10 (Marshalls sworn)

11 MR. JACOBS: Your Honor, may we have a side bar.

12 (At the side bar)

13 MR. JACOBS: One minute, your Honor, With regard  
14 to inferences I believe your Honor should tell the jury that  
15 if they reach a conclusion that a piece of evidence is subject  
16 to two inferences, one which is innocent and one which is  
17 not innocent, they must accept the innocent one.

18 THE COURT: It only applies in the courts of the  
19 State of New York and not in the Federal courts.

20 MISS NEUGARTEN: I would appreciate it if you  
21 could inform the jury they should return a separate verdict  
22 as to each count.

23 THE COURT: That's what I did.

24 MISS NEUGARTEN: All right.

25 MR. JACOBS: That's all I have.

